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**IN THE
COURT OF APPEALS OF INDIANA**

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STATE OF INDIANA,
Appellee-Plaintiff.

OCTOBER 15, 2008

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Abundio Ramirez appeals the twenty-year sentence imposed after he pled guilty to child molesting, a Class B felony. We affirm.

ISSUES

Ramirez raises a single issue with multiple parts, which we restate as the following two issues:

- I. Whether the trial court abused its discretion in finding particular aggravators and in not finding Ramirez's guilty plea as a mitigator.
- II. Whether the enhanced sentence was inappropriate.

FACTS AND PROCEDURAL HISTORY

In 2002, Ramirez, then twenty-three years old, began having sexual intercourse with twelve-year-old A.P. A.P., who was mildly mentally handicapped, became pregnant by Ramirez and delivered a baby girl when she was thirteen years old. On March 6, 2006, the State charged Ramirez with child molesting as a Class A felony. On September 2, 2007, the State filed a second count charging Ramirez with child molesting as a Class B felony, and Ramirez pled guilty to this charge. A factual basis was established, and the State dismissed the first count. Sentencing was left to the discretion of the trial court.

After a sentencing hearing, the trial court found the following aggravating circumstances: (1) Ramirez took advantage of a mildly mentally handicapped victim; (2) Ramirez occupied a position of trust to the twelve-year-old victim; (3) Ramirez has a prior criminal history; (4) Ramirez is in the United States illegally; and (5) Ramirez, who pled guilty and took responsibility for his crime, changed his story at the sentencing

hearing. The trial court then imposed an enhanced sentence of twenty years.¹ Ramirez now appeals.

DISCUSSION AND DECISION

I. AGGRAVATORS AND MITIGATOR

A. Standard of Review

Generally, the statute in effect at the time of the offense is the statutory basis for sentencing. *Lunsford v. State*, 640 N.E.2d 59, 60 (Ind. Ct. App. 1994). Sentencing decisions are within the trial court’s discretion and are governed by Ind. Code § 35-38-1-7.1. *Groves v. State*, 787 N.E.2d 401, 407 (Ind. Ct. App. 2003), *trans. denied* (citing *Henderson v. State*, 769 N.E.2d 172, 179 (Ind. 2002)). We review a trial court’s sentencing decision only for an abuse of discretion, including a trial court’s decision to increase or decrease the presumptive sentence because of aggravating or mitigating circumstances. *Id.* The trial court is not obligated to weigh aggravating or mitigating factors the way a defendant suggests they should be weighed. *Abel v. State*, 773 N.E.2d 276, 280 (Ind. 2002).

B. Sixth Amendment Claim

Ramirez contends that his sentence violates the Sixth Amendment to the United States Constitution under the U.S. Supreme Court’s holding in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004) and our supreme court’s holding in *Smylie v. State*,

¹ At the time Ramirez committed the offense, Ind. Code § 35-50-2-5 stated that a person who commits a Class B felony “shall be imprisoned for a fixed term of ten (10) years, with not more than ten (10) years added for aggravating circumstances or not more than four (4) years subtracted for mitigating circumstances. . . .”

823 N.E.2d 679, 682 (Ind. 2005). The State counters that Ramirez waived this claim by not raising it before the trial court.

A claim is generally considered forfeited if it is not raised at trial. *See Smylie*, 823 N.E.2d at 689. In *Smylie*, however, our supreme court held that the State's waiver argument failed because the defendant's trial counsel could not have contemplated the holding of *Blakely* before its issuance. *Id.* Here, however, Ramirez's sentencing hearing took place over three and a half years after *Blakely* was decided. Ramirez waived his claim when he did not make a *Blakely* objection to the trial court.

C. A.P.'s Mental Handicap

Ramirez contends that the trial court erred in concluding that the State presented evidence sufficient to prove that A.P. had a mental handicap. He argues that no state witness testified to whether the administrator of the I.Q. test had experience "in dealing with Hispanics and testing their I.Q." Appellant's Brief at 11. He further argues that no State witness testified to the effect of A.P.'s "depression" upon the test results.

Ind. Code § 35-38-1-7(b)(6) states that a trial court may consider as an aggravating circumstance that "[t]he victim of the crime was mentally or physically infirm." Here, a child services caseworker testified that she was aware of I.Q. tests that indicated A.P. was mildly mentally handicapped and that at least one of the tests was administered at a facility with bilingual services. The caseworker also testified that A.P. required special education services at school. The issue of A.P.'s mental condition is one for the trier of fact. We cannot say that the trial court erred in determining that A.P. suffered the aforementioned handicap.

D. Position of Trust/Age

The evidence presented at the sentencing hearing indicates that Ramirez lived with others in an apartment on the first floor of his uncle's house and A.P. lived in an apartment on the second floor of the house. Ramirez and A.P. were friends before he began molesting her. The trial court found the age difference between A.P. and Ramirez to be an aggravator and also found Ramirez's position of trust to be a separate aggravator. Ramirez, citing *Loveless v. State*, 642 N.E.2d 974 (Ind. 1994), contends that the trial court erred in finding these facts as separate aggravators.²

In *Loveless*, our supreme court noted that the appreciable age difference between the sixteen-year-old defendant and the twelve-year-old victim indicated that the defendant, not the victim, was in control of events that led to the victim's death. *Id.* at 977. The court treated the age difference and the defendant's control as a single aggravator, and it concluded that it was an aggravator of substantial weight. *Id.*

Here, the trial court did appear to treat A.P.'s age and Ramirez's position of trust as separate aggravators. Under the circumstances of the case as presented by the State and recited by the trial court, we believe that they constitute two elements of the same substantial aggravator.

E. Ramirez's Criminal History

The pre-sentence report indicated that Ramirez had a criminal history that included refusal to identify as a Class C misdemeanor and operating while intoxicated as

² Although Ramirez cites *Davis v. State*, 796 N.E.2d 798 (Ind. Ct. App. 2003), for the concept that an element of an offense may not be used to enhance a sentence without citing the element as a particular circumstance, he appears to concede that the trial court properly cited A.P.'s age as such a circumstance.

a Class A misdemeanor. The trial court identified this criminal history as an aggravator but did not indicate how much weight was given thereto. Ramirez cites *Ruiz v. State*, 818 N.E.2d 927, 929 (Ind. 2004), for the proposition that “convictions for alcohol-related offenses are at best marginally significant as aggravating circumstances in considering a sentence for a Class B felony.” Ramirez also cites *Wooley v. State*, 716 N.E.2d 919 (Ind. 1999), for the proposition that the sole aggravator of a prior conviction for driving while intoxicated is not significant enough to warrant enhancement in a murder case.

We agree with the trial court that Ramirez’s criminal history is a valid aggravator. *Ruiz* and *Wooley* teach us, however, that Ramirez’s criminal history should not be given significant weight.

F. Ramirez’s Status as an Illegal Alien

The trial court found that Ramirez “is an undocumented alien from the country of Guatemala here in the United States illegally, [and] that’s an aggravating circumstance at least for the record today. . . .” Appellant’s App. at 159. Ramirez acknowledges that citizenship status may be considered as an aggravating circumstance; however, he contends that there was insufficient evidence to show he was in the United States illegally.

The State presented evidence that federal immigration officials were requesting that Ramirez be detained because of a pending investigation to determine whether he was subject to removal from the United States. While this evidence alone is insufficient to prove Ramirez’s illegal status, the State also presented Ramirez’s statement that six years prior he traveled through “the mountains and deserts to gain entry into the country.”

Appellant's App., Volume 2, at 5. Furthermore, the trial court had before it Ramirez's counsel's admission that Ramirez was in the United States illegally. Tr. at 49. We cannot say that the trial court erred in concluding that Ramirez was an illegal alien.

G. Ramirez's Guilty Plea

Ramirez contends that the trial court erred in not finding his guilty plea to be a mitigator. We note that Indiana courts have recognized that a guilty plea is a significant mitigating factor in some circumstances. *Comer v. State*, 839 N.E.2d 721, 728 (Ind. Ct. App. 2005), *trans. denied*. Where the State reaps a substantial benefit from the defendant's plea, the defendant deserves to have a substantial benefit returned. *Id.* However, a guilty plea is not automatically a significant mitigating factor. *Id.* Where it is clear from the record that a defendant has received a significant benefit from pleading guilty, "a trial court does not abuse its discretion by not identifying [a defendant's] guilty plea as a mitigating factor." *Id.* at 729.

Interestingly, Ramirez simultaneously contends that his guilty plea should be considered a substantial mitigator and that his open plea was not really a guilty plea. The record indicates that the State dismissed its original count of child molesting as a Class A felony in exchange for Ramirez's plea of guilty to the lesser offense of child molesting as a Class B felony. We cannot say under these circumstances that the trial court erred in determining there was a guilty plea and that the plea was not a mitigator because Ramirez received a substantial benefit by not exposing himself to a possible fifty-year sentence.³

³ At the time of the offense, Ind. Code § 35-50-2-4 provided that a person who commits a Class A felony "shall be imprisoned for a fixed term of thirty (30) years, with not more than twenty (20) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances."

II. APPROPRIATENESS OF SENTENCE

Ramirez contends that the imposition of a twenty-year sentence is inappropriate; thus, he argues that the sentence should be revised. A sentence authorized by statute will not be revised unless the sentence is inappropriate in light of the nature of the offense and the character of the offender. Indiana Appellate Rule 7(B). We must refrain from merely substituting our opinion for that of the trial court. *Sallee v. State*, 777 N.E.2d 1204, 1216 (Ind. Ct. App. 2002), *trans. denied*. In determining the appropriateness of a sentence, a court of review may consider any factors appearing in the record. *Roney v. State*, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), *trans. denied*.

With regard to character, we note that even though Ramirez held down a job and faithfully sent money to his mother and to the mother of his children in Guatemala, he was doing so while breaking federal law. Our supreme court has held that “being an illegal alien is itself more properly viewed as an aggravator than a mitigator.” *See Samniego-Hernandez v. State*, 839 N.E.2d 798, 806 (Ind. Ct. App. 2005), *abrogated on other grounds by Anglemeyer* (citing *Yemson v. U.S.*, 764 A.2d 816, 819 (D.C.App. 2001)) for the proposition that “in sentencing a criminal defendant, [a] court cannot treat [a] defendant more harshly than any other citizen solely due to [the] defendant’s national origin or alien status, but that does not mean that [the] court must close it eyes to [the] defendant’s illegal alien status and disregard for the law, including immigration laws”). We further note that at his sentencing hearing, Ramirez showed a lack of character by arguing that his twelve-year-old victim seduced him.

With regard to the nature of the offense, we note that Ramirez molested a young, mentally handicapped girl who looked to him for guidance and friendship in her new home. This violation of trust is a substantial aggravator that supports the trial court's enhancement of Ramirez's sentence.

Affirmed.

BAKER, C.J., and NAJAM, J., concur.